

UNITED STATES DISTRICT COURT
for the
DISTRICT OF MASSACHUSETTS

PAUL T. PAPADAKIS,
Plaintiff,

v.

CSX TRANSPORTATION, INC.,
Defendant.

C.A. No.: 04-30189-MAP

**CSX TRANSPORTATION, INC.'S MOTION FOR AN ORDER THAT
PLAINTIFF SUBMIT TO A PHYSICAL EXAMINATION
AND TO EXTEND DISCOVERY**

CSX Transportation, Inc. ("CSX") hereby moves that this Honorable Court *Order* that the plaintiff submit to a physical examination, pursuant to Fed. R. Civ. P. 35(a), conducted by Dr. Edward Feldmann. Further, that CSX be granted additional time, 30 days from the date which the plaintiff is examined, to deliver Dr. Feldmann's report as required by Fed. R. Civ. P. 35(b) and pursuant to the expert disclosure requirements set forth in the *Scheduling Order*.

As grounds therefore, CSX states the following:

1. The plaintiff claims injuries allegedly caused by CSX's negligence and/or failure to use reasonable care.
2. Given the plaintiff's alleged injuries to his L45 disc, his lumbrosacral strain and nerve root compression, CSX desires that Dr. Edward Feldmann, M.D., who specializes in neurology, conduct an examination of the plaintiff. Dr. Feldmann graduated from Harvard Medical School and completed his residency at the Cornell Medical Center. Presently, Dr. Feldmann is an Associate Professor in the Department of Clinical Neurosciences at Brown University School of Medicine in Providence, Rhode Island, and

he practices at Rhode Island Hospital.

3. For over the last month, CSX had been attempting to secure an agreement with plaintiff that he submit to an *Independent Medical Examination* ("IME"). *See Letter to Thornton & Naumes, LLP, from Flynn and Associates, P.C.*, dated September 12, 2005, a copy of which is attached hereto as Exhibit "A."
4. On or about September 13, 2005, the parties had reached an agreement that the plaintiff would submit to an IME and, thereafter, CSX proceeded to obtain dates on which Dr. Feldmann was available to conduct the examination. *See Letter from Thornton & Naumes, LLP, to Flynn and Associates, P.C.*, dated September 13, 2005, a copy of which is attached hereto as Exhibit "B."
5. Dr. Feldmann is only available to conduct the plaintiff's examination on October 25, 2005, at 11:00 a.m.; November 1, 2005, at 10:00 a.m.; November 8, 2005, at 11:00 a.m., and November 15, 2005, at 10:00 a.m.
6. The *Scheduling Order*, dated November 22, 2004, requires that CSX designate and disclose information regarding its trial experts, pursuant to Fed. R. Civ. P. 26(a)(2), by October 14, 2005;
7. On October 3, 2005, the plaintiff indicated that he would not submit to the examination unless CSX obtained the court's permission to conduct same and that CSX acquire an extension of its expert disclosure compliance date as set forth in the *Scheduling Order*. *See Letter from Thornton & Naumes, LLP, to Flynn and Associates, P.C.*, dated September 30, 2005, a copy of which is attached hereto as Exhibit "C."
8. Given that the plaintiff did not agree to the examination until recently and that Dr. Feldmann is not available to conduct the examination until late October to mid-

November, the plaintiff now will not voluntarily submit to the examination in that CSX will be unable to comply with its discovery obligations pursuant to the *Scheduling Order* as the *Order* presently stands.

9. CSX only requests, by this motion, a limited amount of time to extend its expert discovery obligation in order for Dr. Feldmann to conduct the examination and write his report.
10. The amount of time needed for the extension is dependent on which date the plaintiff is available to meet with and be examined by Dr. Feldmann.

WHEREFORE, CSX requests that the court *Order* the plaintiff to submit to a physical exam, pursuant to Fed. R. Civ. P. 35(a), and that the court grant to CSX thirty (30) days from the date the plaintiff is examined in order to comply with Fed. R. Civ. P. 35(b).

REQUEST FOR HEARING

CSX respectfully requests a hearing on the within motion in the interests of justice.

CERTIFICATION OF COUNSEL

In accordance with L. R. 7.1(A)(2), I, Valerie A. Murphy, certify that I have conferred with opposing counsel on October 4, 2005, and attempted in good faith to resolve or narrow the issues set forth in the attached motion.

Signed under the pains and penalties of perjury this 4th day of October, 2005.

Respectfully submitted,
CSX TRANSPORTATION, INC.,
by its attorneys,

/s/ Valerie A. Murphy

Michael B. Flynn BBO #559023
Valerie A. Murphy BBO #661460
FLYNN & ASSOCIATES, P.C.
400 Crown Colony Drive, Suite 200
Quincy, MA 02169
(617) 773-5500

Dated: October 4, 2005

Exhibit “A”

FLYNN & ASSOCIATES, P.C.

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September 12, 2005

Via Facsimile and U. S. Mail

Robert M. Byrne, Jr.
Thornton & Naumes LLP
100 Summer Street
30th Floor
Boston, MA 02110

RE: Paul T. Papadakis v. CSX Transportation, Inc.
U.S.D.C., C.A. No.: 04-30189-MAP

Dear Bob:

The purpose of this letter is to memorialize our telephone conversation of Wednesday, September 7, 2005. I requested that your client submit to an IME with Dr. Feldman. You told me that you would think about it and get back to me. I await your response in this regard. Please be advised that if you do not agree to the IME we will file a motion to compel one.

With reference to postponing the deposition of Ernest Gailor previously scheduled for September 15, 2005, I am in receipt of your letter of September 9, 2005 in which you suggest October 11, 2005 as an alternate date. Since this date coincides with my schedule I have enclosed a *Re-Notice of Deposition* for October 11, 2005 at 10:30 AM at our offices. In addition, we have agreed that we will pay what is required under the rules for this deposition.

Further, we demand that you produce a copy of Mr. Gailor's complete file on this case by Friday, October 7, 2005 for our review. Production of these documents by October 7, 2005 is a pre-requisite to the deposition being taken as scheduled.

Thank you for your attention to this matter.

Sincerely,



Michael B. Flynn

MBF/peg

Enclosure

cc: Gary Baker

Valerie A. Murphy, Esq.

G:\F & A\CASE FILES\CSX P\Papadakis\Correspondence\attorney\9-12-05 - Byrne Ltr re Gailor depo and IME.doc

Exhibit “B”

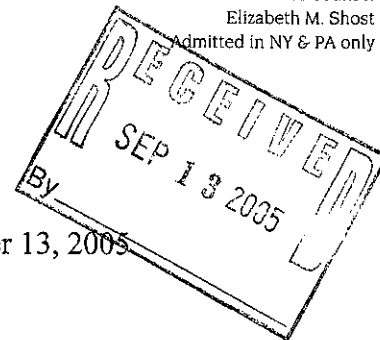
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September 13, 2005

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Quincy, Massachusetts 02169

RE: Paul T. Papadakis vs. CSX Transportation, Inc.
United District Court/Massachusetts C.A. No.: 04-30189-MAP

Dear Attorney Flynn:

This letter serves to confirm that Mr. Paul Papadakis will submit to an IME with Dr. Feldman.

If you have any questions or comments concerning this matter, please do not hesitate to contact me.

Very Truly Yours,

Robert M. Byrne, Jr.

RMB/mm

Exhibit “C”

MAF VAL

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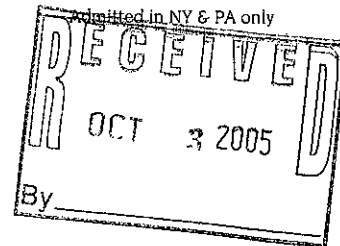
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September 30, 2005

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RE: Paul T. Papadakis vs. CSX Transportation, Inc.
United District Court/Massachusetts C.A. No.: 04-30189-MAP

Dear Ms. Murphy,

I am receipt of your letter of September 29th regarding a so-called "independent medical examination" of Mr. Papadakis. In light of the admonition by Judge Neiman and the allowance of your Motion for Reconsideration that side agreements between the parties are not binding on the court along with the fact that the scheduling order required that the defendant disclose expert information by October 14, 2005 leads me to conclude that if you wish to use Dr. Needleman as a trial expert, it will be necessary for you to file a motion requesting relief from the deadlines of the scheduling order.

If you wish to discuss the foregoing, please do not hesitate to contact me.

Very truly yours,

Robert M. Byrne, Jr.

RMB/ddr